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No. 75-1878

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

ESTHER A. LANDGRAFF, Appellant

v.

A. G. WAGNER, M.D.; SAMARITAN HEALTH SERVICES, a corporation; GOOD SAMARITAN HOSPITAL, a business association; and FRANK R. PRECHENY, M.D., Appellees

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On Appeal From
The Supreme Court of Arizona

MOTION TO DISMISS

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STATEMENT OF FACTS

The Appellant, Esther Landgraff, first consulted the Appellee, Dr. A. G. Wagner, in September, 1962, regarding a gall bladder problem. Mrs. Landgraff was admitted to Good Samaritan Hospital on September 24, 1962, and on the following day, Dr. Wagner performed surgery on Mrs. Landgraff to remove stones from her gall bladder. Mrs. Landgraff's post-operative course was uneventful.

In November, 1962, Mrs. Landgraff was once again hospitalized and on November 15, 1962, Dr. Wagner again performed surgery on Mrs. Landgraff for removal of gall bladder stones. Within a few days following her release from the hospital after the second operation, Mrs. Landgraff began experiencing pain at the surgical site. Mrs. Landgraff continued having pain and drainage in the area of the surgical site for seven to eight months after the second operation. During this

period she continued to see Dr. Wagner for check-ups. Dr. Wagner did not believe that it was unusual for a patient to have these types of complications post-operatively and he did not believe an abdominal x-ray was required. The drainage tube which Dr. Wagner had previously inserted was removed by Dr. Wagner some time in 1963. After this drainage tube was removed, Mrs. Landgraff continued to have pain at the surgical site and did not go back to work until 1965. Mrs. Landgraff returned to work as a cocktail waitress at the Phoenix Country Club in 1965, but worked only part time until 1967 when she resumed work on a full-time basis.

Although Mrs. Landgraff experienced pain almost every day from 1963 until 1971, and although she did not believe that this was normal and thought that something was wrong with her, she did not see a physician

during that period. Several of Mrs. Landgraff's friends advised her to consult with a physician concerning the frequent pain she was experiencing, but she refrained from doing so, because her husband did not believe in doctors and did not believe in paying their "exorbitant" fees. Rather than precipitate a domestic quarrel, Mrs. Landgraff acceded to her husband's wishes and did not seek the advice of a physician.

On September 8, 1971, the pain became so acute that some of Mrs. Landgraff's friends took her to the Emergency Room at Good Samaritan Hospital. X-rays were taken by the interns present at the hospital and at that time a steel hemostat was located in Mrs. Landgraff's abdomen. After Dr. Wagner was notified, he showed Mrs. Landgraff the x-rays and informed her that there was a hemostat present. Mrs. Landgraff agreed to have

Dr. Wagner remove the hemostat and was admitted to the hospital on September 8, 1971 for the surgery.

Mrs. Landgraff did not file suit against the Appellees until December 31, 1972.

PROCEDURAL ASPECTS OF THE CASE

After the complaint was filed, defendants answered and discovery proceedings were undertaken. The defendants Samaritan Hospital Services and Frank R. Precheny, M.D. filed a Motion for Summary Judgment on June 13, 1973, premising their Motion upon the bar imposed by A.R.S. §12-542(B), the Arizona statute of limitations for actions against health providers. That Motion for Summary Judgment was granted on August 10, 1973 and the defendant A. G. Wagner, M.D. filed a Motion for Summary Judgment upon the

same grounds.

After various objections to the proposed form of judgment were resolved, the court granted both Motions for Summary Judgment and the formal written judgments were signed by the court on October 22, 1973. Appellant filed a Notice of Appeal and bond along with the Designation of Record on Appeal on December 13, 1973.

On February 5, 1976, the Arizona Court of Appeals rendered its opinion, reversing the grants of summary judgment and remanding the case to the trial court with instructions. (See Appellant's Appendix A.) The Arizona Court of Appeals denied rehearing on March 8, 1976 and the appellant petitioned for review by the Supreme Court of Arizona. Review was denied in a memorandum decision on March 30, 1976. (See Appellant's Appendix B.)

Appellant has based her appeal to the United States Supreme Court upon 28 U.S.C. §1257(2).

GROUNDS FOR DISMISSAL

I. THIS COURT LACKS JURISDICTION OF THIS MATTER INASMUCH AS THE ARIZONA COURT OF APPEALS OPINION AND THE ARIZONA SUPREME COURT'S DENIAL OF REVIEW DO NOT CONSTITUTE FINAL JUDGMENTS OR DECREES WITHIN THE MEANING OF 28 U.S.C. §1257.

II. THIS APPEAL SHOULD BE DISMISSED INASMUCH AS THE ARIZONA COURT OF APPEALS OPINION RESTED ON ADEQUATE NON-FEDERAL GROUNDS.

III. THIS APPEAL SHOULD BE DISMISSED INASMUCH AS THE ISSUES RAISED BY APPELLANT DO NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS.

I. THIS COURT LACKS JURISDICTION OF THIS MATTER INASMUCH AS THE ARIZONA COURT OF APPEALS OPINION AND THE ARIZONA SUPREME COURT'S DENIAL OF REVIEW DO NOT CONSTITUTE FINAL JUDGMENTS OR DECREES WITHIN THE MEANING OF 28 U.S.C. §1257.

The Appellant in this case appeals from the decision of the Arizona Court of Appeals and the Arizona Supreme Court's denial of review despite the fact that the trial court's decision was reversed with instructions for additional proceedings below. The Arizona Court of Appeals remanded the case to allow certain important fact issues relating to statutory tolling provisions to be determined by the factfinder below. If these factual issues are determined in favor of the Appellant, any ultimate issue as to the

constitutionality of the medical malpractice statute of limitations will be "mooted."

28 U.S.C. §1257 provides that only final judgments and decrees of the highest state courts may be reviewed by the United States Supreme Court.

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court . . . 28 U.S.C. §1257

The Supreme Court has consistently adhered to this requirement of finality in considering appeals from the decisions of state courts. In Market Street Railway Co. v. Railroad Commission of the State of California, 324 U.S. 548, rehearing denied 324 U.S. 890 (1944), the court considered the issue of finality and stated:

"Our jurisdiction to review a state court judgment is confined by longstanding statute to one which is final . . . . Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." 324 U.S. at 551.

That a constitutional issue might become moot because of certain further proceedings in a case is precisely a reason for dismissing an appeal. In the recent case of Costarelli v. Massachusetts, -- U.S.--, 44 L.Ed.2d 76 (1975), the Court dismissed an

appeal in a per curiam opinion and stated:

> "That the issue might be mooted by his acquittal in Superior Court is of course without consequence, since an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may be otherwise resolved."
> --U.S.--, 44 L.Ed 2d at 79.

This requirement of finality is important for several reasons. First, it avoids the possibility of advisory opinions in situations when there may be no actual "case or controversy." Secondly, such a requirement reduces federal intrusion in state matters. This requirement of finality also fosters judicial

economy by avoiding piecemeal review of state court decisions.

Inasmuch as the judgment of the trial court was reversed by the Arizona Court of Appeals and remanded to that court for determination of certain important factual issues which may be dispositive, the Court of Appeals decision should not be regarded as a final judgment within the meaning of 28 U.S.C. §1257.

II. THIS APPEAL SHOULD BE DISMISSED INASMUCH AS THE ARIZONA COURT OF APPEALS OPINION RESTED ON ADEQUATE NON-FEDERAL GROUNDS.

This appeal should also be dismissed because the Arizona Court of Appeals decision was based upon that court's interpretation of a state statutory provision.

It is a long established rule that the Supreme Court will not accept review of state court decisions when the decision was based on adequate non-federal grounds. Eustis v. Bolles, 150 U.S. 361 (1893). In considering appeals, this rule has be followed consistently by the Supreme Court. This Court stated, for example, in Fox Film Corp. v. Miller, 296 U.S. 207,210 (1935) that it was:

> ". . . the settled rule that when the judgment of a state court rests upon two grounds, one of which is federal in character and

the other non-federal in character, our jurisdiction fails if the non-federal is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as Klinger v. Missouri, 13 Wall. 257, 263, 20 L.Ed. 635, 637, and has been reiterated in a long line of cases since that time."

The opinion in Fox Film was recently cited with approval in Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 489 (1965).

The decision of the Arizona Court of Appeals in the present case reversed the trial court's judgment, and was based on the interpretation of Arizona statutes. As the result of its examination of the Arizona

statute of limitations, the Court of Appeals remanded the case for determination of factual issues that may be dispositive. Disposition of the case in the court below will therefore rest not on federal grounds, but on an adequate state basis independent of the constitutional grounds asserted by the Appellant.

III. THIS APPEAL SHOULD BE DISMISSED INASMUCH AS THE ISSUES RAISED BY APPELLANT DO NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS.

This Court has long maintained that statutes of limitations do not involve fundamental constitutional rights. In Terry v. Anderson, 95 U.S. 628, 633 (1877) the Court stated:

> "This Court has often decided that statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of the action before the bar takes effect. [citations omitted] And it is difficult to see why, if the Legislature may prescribe a limitation where none

> existed before, it may not change one which has already been established."

The highest courts of states other than Arizona have examined similar medical malpractice statutes of limitation and have held that they are, indeed, constitutional. In McCarty v. Goldstein, 151 Colo. 154, 376 P.2d 691 (1962), for example, the Supreme Court of Colorado held that a malpractice statute of limitations which applied only to actions against "persons licensed to practice medicine, chiropractic, osteopathy, chiropody, midwifery or dentistry" did not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution since the classification made by the legislature was neither arbitrary or unreasonable.

In a similar case, the Alabama Supreme

Court in Fellers v. Edwards, 289 Ala. 2, 265 So. 2d 438 (1972) considered a statute of limitations applicable to actions against "physicians and surgeons and dentists." The Alabama court, in upholding the statute, stated:

> "A state is not prohibited upon constitutional grounds from making classifications of persons and objects, or from passing laws which apply only to persons within a designated class. Classification is an inherent power of the legislature but it must not be arbitrary and unreasonable. In order to justify interference by the courts with the wide discretion which the legislature has in such matters, it should appear that the interest of those generally affected by

> the act, as distinguished from those of a particular class, require such interference."
>
> 265 So.2d at 440

As to Appellant's contention that the Arizona medical malpractice statute of limitation is unconstitutional on due process grounds because it may bar a claim before an injury is discovered, it should be pointed out that such were not the facts of this case. In this case, the Appellant, in fact, waited over eleven months after the discovery of the hemostat to file suit.

Even if this Court were to examine Appellant's due process argument, a similar matter was considered by this Court in Mattson v. Department of Labor and Industries of the State of Washington, 293 U.S. 151 (1934). In Mattson, the Supreme Court considered an amendment to the Washington workmen's com-

pensation statutes that conclusively barred any claim for aggravation of injury after three years.

"The appellant insists that at the date of his injury the statute conferred upon him not only a right to make his original claim and receive compensation, but a further right to file an additional claim, without limit as to time, and to receive readjusted compensation for aggravation of his condition due to his injury. This, he says, is a vested right, is property, and its enforcement may not be abolished or limited, consistently with the due process clause of the Fourteenth Amendment of the federal Constitution.

The claim cannot be sustained. . . . That the State may impose reasonable conditions upon the assertion of the claim does not admit of argument. Considerations justifying a reasonable limitation of time within which further increase of compensation due to aggravation of condition may be claimed are so obvious as hardly to require statement. Appellant does not urge that the prescription of a period of three years for presenting such a claim is unreasonable, but that it is beyond the State's power. The section under attack merely limits the time for the assertion of the right, affects the remedy only,

and that in a manner not unreasonable, arbitrary or oppressive. Such a limitation of time within which appellant's remedy must be pursued does not deprive him of due process. The judgment is affirmed.

293 U.S. at 154-155

Although statutes of limitation often bar otherwise valid claims, this is inherent in their nature.

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories

have faded, witnesses have died or disappeared, and evidence has been lost. [Citations omitted]. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and the unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. [A plaintiff] may, of course, have

the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control."

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945)

The Appellant has failed to raise substantial federal questions. Statutes of limitations have in the past been challenged before this Court on both due process and equal protection grounds and this Court has summarily rejected such arguments. The Arizona statute of limitations for claims against health providers, A.R.S. §12.542, is a constitutional enactment that is no way violative of due process or equal protection.

CONCLUSION

Appellant appeals from an Arizona Court of Appeals decision that actually reversed the trial court's judgment and based upon its interpretation of the applicable statutes, remanded the case for additional findings of fact. The opinion was thus not only premised upon an independent state ground but also lacks the finality required for this Court to assume jurisdiction. The Appellant has also failed to assert substantial federal issues inasmuch as the issues raised have been summarily disposed of by previous decisions of this Court.

Based upon the foregoing, Appellee A. G. Wagner, M.D. respectfully requests that this Court dismiss the appeal of the Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, HARRY J. CAVANAGH, an attorney for Appellee, A. G. Wagner, M.D., certify that I deposited in the United States mail, postage prepaid, an envelope containing forty copies of Appellee, A. G. Wagner's Motion to Dismiss, addressed to the Supreme Court of the United States, Washington, D.C. and mailed copies of the Motion this 23rd day of July, 1976, to the following parties:

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